Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Implementation of the Telecommunications Act of 1996	)	CC Docket No. 96-115
Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information;	)	
Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, As Amended	)	CC Docket No. 96-149

COMMENTS OF AT&T CORP.

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SUMMARY

AT&T's Comments show, in Part I, that the Commission should allow telecommunications carriers to choose between an opt-out mechanism and an opt-in mechanism. First of all, interpreting "approval" (as used in section 222(c)(1) of the Act) to require express, or "opt-in," approval violates the plain meaning of the word, when viewed in its context. The structure of the Telecommunications Act of 1996 makes clear that, when Congress intended to require express approval, Congress used the word "express." Second, construing "approval" to mandate express approval would give rise to substantial First Amendment concerns, as the Court of Appeals for the Tenth Circuit recently made clear in US West v. Federal Communications Commission, 182 F.3d 1224 (1999). No government interest in privacy or competition can justify the infringement of carriers' constitutional right to disseminate information.

Fortunately, adhering to the text of the Act and the strictures of the Constitution would not undermine the Commission's well-considered policy goals, which AT&T fully endorses. In AT&T's view, defining "approval" broadly (and correctly) to include "opt-out" approval would not only adequately protect consumers' privacy, but also better serve consumer welfare by improving information flow, augmenting the quality of telecommunications services, and reducing prices. If the Commission adopts this definition of "approval," the Commission need not reevaluate the "total service approach," which is fully consistent with an opt-out approval mechanism.

AT&T shows in Part II that section 272's prohibition on discrimination by BOCs applies to the sharing of CPNI. The plain text of section 272 prohibits BOCs from discriminating in the provision of "information," a term which indubitably includes CPNI. Moreover, construing section 272 to cover CPNI would not impose an onerous burden on BOCs. All the BOCs would

have to do to comply with section 272 is obtain a blanket approval from the customer. This minor burden becomes even less significant if carriers, including BOCs, can obtain opt-out approval.

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COMMENTS OF AT&T CORP.

Pursuant to the Commission's Second Further Notice of Proposed Rulemaking, FCC 01-247, released on September 7, 2001 ("Notice"), and section 1.415 of the Commission's rules, 47 C.F.R. § 1.415, AT&T Corp. ("AT&T") submits these comments on telecommunications carriers' use of customer proprietary network information ("CPNI") and the implementation of the non-accounting safeguards of sections 271 and 272 of the Communications Act of 1934, as amended.

I. THE COMMISSION SHOULD ALLOW TELECOMMUNICATIONS CARRIERS TO CHOOSE BETWEEN AN OPT-OUT MECHANISM AND AN OPT-IN MECHANISM.

Telecommunications carriers should be permitted to choose between an opt-out mechanism and an opt-in mechanism. Construing section 222 to prohibit opt-out approval would violate the plain language of the statute, give rise to substantial constitutional concerns, and

undermine the policy goals underlying the Act. Moreover, permitting opt-out approval is fully consistent with the Commission's "total service approach."

A. SECTION 222 CLEARLY PERMITS OPT-OUT APPROVAL.

Consistent with the text of section 222, the Commission should permit telecommunications carriers to adopt an opt-out mechanism. Section 222(c)(1) broadly permits use of CPNI with the "*approval* of the customer." § 222(c)(1) (emphasis added). In isolation, to be sure, the meaning of "approval" may be unclear; divorced from its context, "approval" could mean strictly an *express* act of finding commendable or acceptable, namely a decision to opt-in. But words in a statute must be construed in light of their context, see, e.g., Tyler v. Cain, 121 S. Ct. 2478, 2482 (2001), and interpreted so as not to render other statutory terms superfluous, Circuit City v. Adams, 121 S. Ct. 1302, 1308 (2001). Interpreting "approval" to require an express act would indeed render other language in section 222 superfluous. Section 222(f), which addresses authority to use wireless location information, specifically speaks of *"express* authorization." Construing "approval" (a synonym of authorization) to mean "express approval" would render the word "express" in section 222(f) redundant; Congress could simply have said "authorization" or "approval" and achieved the same effect.

Furthermore, sections 222(f) and 222(c)(1) are not disjointed, unrelated provisions that can be read separately from one another. Section 222(f) explicitly references section 222(c)(1). See § 222(f) ("*For purposes of subsection (c)(1)*, without the express prior authorization of the customer, a customer shall not be considered to have approved the use or disclosure or access to [certain] location information.") (emphasis added). Section 222(f) in effect provides that the broad term "approval," which is generally applicable to disclosures of CPNI, must be restricted when applied to a subset of situations. Congress clearly had the language of section 222(c)(1) in

mind when it drafted section 222(f), and it chose to adopt narrower language in section 222(f). This legislative choice would be negated if the Commission maintains its opt-in approval requirement.

Section 222(f) shows that, when Congress wants to mandate express customer consent, it indicates as much by using the word "express." Because section 222(c)(1) does not speak of "express approval," such approval is not necessary. Telecommunications carriers should be permitted to rely on implied customer consent, such as that obtained through an opt-out mechanism.[1]

B. CONSTRUING SECTION 222 TO PERMIT OPT-OUT APPROVAL WOULD AVOID SUBSTANTIAL CONSTITUTIONAL CONCERNS.

Even if the word "approval" were ambiguous in its context, the Commission should construe it to encompass implied approval, so as to avoid constitutional problems. The Court of Appeals for the Tenth Circuit strongly suggested that an opt-in requirement would run afoul of the First Amendment. See US West, 182 F.3d at 1240. The court concluded that: (a) "CPNI regulations restrict speech" by precluding telecommunications companies from tailoring and targeting their speech to a particular audience, id. at 1232; (b) the appropriate constitutional test is the one for commercial speech under Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557 (1980), see id. at 1233;[2] and (c) on the record before the court, the

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[1] To clarify, telecommunications carriers should be permitted to choose between an opt-out mechanism and an opt-in mechanism. If a carrier believes that customer-relations concerns counsel in favor of opt-in approval, the carrier should be permitted to elect opt-in approval.

[2] Because the Tenth Circuit concluded that the speech at issue is commercial speech, the court did not apply strict scrutiny. See US West, 182 F.3d at 1232-33 & n.4. The court erred in this regard. Commercial speech is expression that "does no more than propose a commercial transaction." Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer

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government failed to meet its burden under Central Hudson, see US West, 182 F.3d at 1234-39. In vacating the Commission's CPNI order, the Tenth Circuit made clear that deferential administrative-law standards are inapplicable and that the Commission must consider whether an opt-in requirement can satisfy the Central Hudson test. See id. at 1240 & n.15.

An opt-in requirement cannot survive Central Hudson scrutiny. Because the speech at issue concerns a lawful activity and is not misleading, the government cannot restrict the speech under Central Hudson unless: (1) the government has a substantial state interest in regulating the speech, (2) the regulation directly and materially advances that interest, and (3) the regulation is no more extensive than necessary to serve the interest. See Central Hudson, 447 U.S. at 564-65. The Tenth Circuit expressed doubt as to whether the Commission's asserted interests in privacy and competition rise to the level of substantial. See US West, 182 F.3d at 1234-37. The Tenth Circuit nonetheless "assume[d] for the sake of th[at] appeal" that they did. Id. at 1236. Like the

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> Council, Inc., 425 U.S. 748, 762 (1976) (citation and internal quotation marks omitted); see also City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 422 (1983) (noting the Supreme Court's desertion of the alternative test for commercial speech – whether the "expression related solely to the economic interests of the speaker and its audience"); Board of Trustees v. Fox, 492 U.S. 469, 469, 473-74(1989) ("[P]roposing a commercial transaction . . . is the test for identifying commercial speech."). Transfers of CPNI do much more. Much like any newspaper, magazine, or book, a transfer of CPNI disseminates information. The recipient of the information might subsequently use it in a commercial transaction, but that fact is constitutionally irrelevant. A reader of Consumer Reports, for example, might use the information in the magazine to buy a new car or toaster, but that does not render the periodical ineligible for full First Amendment protection.
>
> In any event, as shown below, an opt-in requirement fails even Central Hudson's intermediate level of scrutiny test. *A fortiori*, it cannot survive the more-demanding test of strict scrutiny, which requires a speech restriction to be narrowly tailored to promote a compelling government interest. See Perry Ed. Assn. v. Perry Local Educators' Assn., 460 U.S. 37, 45 (1983).

Tenth Circuit, for purposes of these comments, AT&T will assume *arguendo* that the first prong of the Central Hudson test has been satisfied.

Even under this assumption, an opt-in requirement does not satisfy constitutional scrutiny. An opt-in requirement fails the second prong of Central Hudson because it does not materially advance the government's interest in either privacy or competition. As for privacy, Congress was addressing a particular privacy concern when it promulgated section 222[3] -

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[3] In its brief and at oral argument, the Commission suggested to the Tenth Circuit that restrictions on CPNI promote an additional privacy interest - protecting consumers from the intrusion of telemarketing. By its terms, however, the purpose of Section 222 is protection of confidential information, see § 222(a), not protection against unwanted solicitations, which is addressed elsewhere in the Telecommunications Act, see § 227(c).

In any event, this purported justification is insufficient under Central Hudson. An opt-out requirement does not materially advance the interest in protecting consumers from invasive telemarketing. Indeed, limiting the use of CPNI may have the effect of increasing the number of solicitations by telecommunications carriers. Under an opt-in regime, carriers may have trouble targeting a new service to those customers who are most interested in it, and may thus be forced to call more people, including those who have no desire to subscribe to the service. And even if an opt-in requirement were to decrease the number of telemarketing calls, it is far from clear whether such reduction would, in the aggregate, enhance consumers' privacy. Not all people view telemarketing as invasive. And for those who do find it invasive, an opt-in rule would make little difference to the total number of telemarketing calls that are received. The rule, of course, would have no effect on most of the telephone solicitations that people receive at home, those made by credit card companies, magazine publishers, or other businesses that are not telecommunications carriers; nor would the approval mechanism affect those calls that telecommunications carriers make without the use of CPNI. Thus, if an opt-in rule leads to any reduction in telemarketing, it is a trivial reduction, not one which will materially preserve the privacy of the home. In addition, further undercutting the argument that an opt-in mechanism is necessary to protect against invasive calls is the fact that the traditional response to unwanted telemarketing has been to request placement on a "Do not call" list. See, e.g., 27 U.S.C. § 227; 47 C.F.R. § 64.1200(e)(2)(vi); Fla. Stat. Ann. § 501.059(3) (West 1997); Ga. Code Ann. § 46-5-27(d)(1) (Supp. 2000). If an opt-in requirement were necessary to protect privacy, then opt-out through a "Do not call" list would not be the standard, pervasive practice.

Finally, an opt-in requirement fails the third prong of Central Hudson because it is more extensive than necessary to achieve the government interest in reducing the number of

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"protect[ing] the confidentiality of proprietary information," § 222(a) - and there is no reason to believe that an opt-in requirement materially advances this interest. Customers who care about the number of people with access to their CPNI can protect themselves through any approval mechanism. Provided adequate notice is given and the means for withholding approval are straightforward,[4] these people are precisely the ones who will take advantage of the mechanism, whatever it might be. If the approval mechanism is opt-out, then a customer who is truly concerned about ensuring the confidentiality of his or her CPNI will simply opt-out.

As for those customers who decline to opt out, there is no reason to believe that they place a high value on keeping their CPNI private, and thus no basis for concluding that an opt-in requirement materially furthers any interest in protecting privacy. Because First Amendment interests are at stake, one cannot simply assume that, "insofar as customers may not actually consider CPNI notices under a notice and opt-out approach, they may be unaware of the privacy protections afforded by section 222, and may not understand that they must take affirmative steps to restrict access to sensitive information," *In the Matter of Implementation of the Telecommunications Act of 1996,* Second Report and Order and Further Notice of Proposed Rulemaking, 13 FCC Rcd. 8061, 8130 (1998) ("Second Report and Order"). The government

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invasive telemarketing calls. Customers who find telemarketing to be objectionable need simply opt-out of receiving future solicitations. As the financial disclosure rules demonstrate, see infra at 7-8, an opt-out system is the narrowly tailored response.

4 If the FCC permits opt-out, each carrier should have discretion to choose among reasonable methods for opting-out. The regulations governing disclosure of financial information serve as a useful guide. See 16 C.F.R. § 313.7 (allowing for any "reasonable" opt-out means, including check-off boxes, an electronic response, and a toll-free telephone number).

made a similar speculative argument against an opt-out mechanism in United States v. Playboy, 529 U.S. 803 (2000), when it contended that a system of "voluntary blocking" of cable pornography would inadequately protect viewers. Rejecting this argument, the Supreme Court held it irrelevant that "voluntary blocking requires a consumer to take action, or may be inconvenient, or may not go perfectly every time." Id. at 824. The Court declined to presume that consumers would fail to protect themselves. Quite simply, to prevail, the government had to present more than anecdote and supposition of customer inaction. See id. at 822-24.

With respect to CPNI, not only is it mere speculation to suggest that an opt-in requirement is necessary to protect customer privacy, but it is weak speculation at that. The reasons are twofold. First, competitive marketplace forces deter carriers from using CPNI unreasonably. If a carrier were to abuse CPNI, customers would likely switch carriers. Second, were an opt-in mechanism necessary, one would expect the government to have mandated opt-in for the disclosure of all private information. As it is, however, financial institutions do not need *any* customer approval - not even opt-out approval - to disclose private financial information to affiliates or to non-affiliated third parties that "perform services for or functions on behalf of the financial institution," 15 U.S.C. § 6802(b)(2); 16 C.F.R. § 313.13, and financial institutions need only opt-out approval to provide private financial information to all other non-affiliated third parties, 15 U.S.C. § 6802(b)(1). In the financial privacy laws, Congress made a determination that opt-in approval is unnecessary to protect the privacy of financial information. Similarly, opt-in approval is unnecessary to preserve the privacy of CPNI.[5]

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[5] To be sure, the Health Insurance Portability and Accountability Act of 1996, P.L. 104-191 § 294, 110 Stat. 1936 (1996), and accompanying regulations, generally require prior written approval for the disclosure of protected health information. But the privacy interest in health information - which includes physiological data on a patient, a blueprint

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Nor can it be said that an opt-in requirement materially advances the government's interest in enhancing competition. An opt-in mechanism, to be sure, makes it more difficult for carriers that possess CPNI to take advantage of that CPNI. To that extent, an opt-in mechanism equalizes the "haves" with the "have-nots." But promoting competition is not about "equalizing the position of competitors." Hawaiian Telephone Company v. Federal Communications Commission, 498 F.2d 771, 774 (D.C. Cir. 1974) (rejecting the Commission's view of competition, and explaining that equalizing competition among competitors "is not the objective or role assigned by law to the Federal Communications Commission"). Id. at 776. It is about allowing competitors the freedom to use their resources to persevere in an open marketplace. If a competitive carrier (such as an interexchange carrier) has obtained an asset (such as CPNI) in a competitive marketplace, "competition" does not dictate that restrictions be placed on the use of that asset to equalize competitors. Rather than promoting competition, these restrictions would be inhibiting it by precluding the use of an asset acquired in the course of competition.

The same cannot be said, however, about ILECs' use of CPNI. ILECs obtained their CPNI, not through voluntary transactions with customers in a competitive marketplace, but through their monopolies. ILECs' use of CPNI is thus a product, not of competition, but of a lack of it. Nonetheless, any risk that ILECs will use their CPNI to the detriment of other carriers is substantially addressed elsewhere in the Act. Most notably, as shown below, section 272, properly construed, covers BOCs' use of CPNI and prohibits BOCs from discriminating in favor of their section 272 affiliates. In addition, although section 272 applies only to BOCs,

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> of the patient's genetic make-up, evidence of the patient's longevity, and perhaps a roadmap of his or her previous social interactions - is no comparison to the privacy interest in CPNI.

section 260 (Provision of Telemessaging Service) and section 275 (Alarm Monitoring Services) impose explicit nondiscrimination duties that extend to all ILECs. Because the Act curtails the anticompetitive conduct of ILECs, it is unclear what competitive benefits an opt-in requirement would add.

Moreover, even if an opt-in requirement promoted the government's interests in privacy and competition, it does not satisfy the third prong of the Central Hudson test. An opt-in requirement is an overly broad response for preserving consumer privacy. Many customers might not care either way about carriers' use of their CPNI, and some might even have a slight preference in favor of disclosure; but these customers might nevertheless fail to opt-in simply because it is not worth their time. To the extent that happens, carriers will be less capable of targeting their speech. And as the Tenth Circuit concluded, government restrictions on the ability to target speech implicate the First Amendment. See US West, 182 F.3d at 1232. The narrowly tailored response to any privacy concerns - as the financial-information rules aptly demonstrate - is an opt-out mechanism that offers clear notice and sufficient opportunity to opt-out. An opt-in requirement is not a narrowly tailored response to any governmental interest in promoting competition. In light of the nondiscrimination provisions currently present in the Act, it is unclear what anticompetitive conduct an opt-in rule is designed to address. To the extent that competition concerns remain, however, the narrowly tailored solution is for Congress to pass other nondiscrimination provisions that do not abridge speech.

C. PERMITTING OPT-OUT APPROVAL WOULD BEST SERVE THE COMMISSION'S INTERESTS IN PROMOTING CONSUMER WELFARE.

Permitting telecommunications carriers to rely on opt-out approval would also better serve consumer welfare. First, opt-out makes it easier for telecommunications carriers to inform customers of the benefits of new products and services. Under opt-out, customer inertia will not

create a barrier to the flow of useful information. Second, by improving a telecommunications carrier's knowledge of its customers and their needs, opt-out helps a carrier design innovative, quality products and bring them to market. Third, opt-out is more cost effective. If telecommunications carriers can rely on implied approvals, the carriers will not have to engage in expensive solicitations. As the Commission has noted, a "prior authorization [or opt-in] rule would vitiate a [carrier's] ability to achieve efficiencies through integrated marketing to smaller customers" and would, as a practical matter, deny to all but the largest business customers the benefits of "one-stop shopping" and integrated marketing. Computer III Remand Order, 6 FCC Rcd. 7571, ¶ 85 n.155 (1991).[6] Finally, as the Commission has already recognized, restricting the use of CPNI within a firm "results in higher prices and reduced quality and variety of regulated services." *Furnishing of Customer Premises Equipment by the Bell Operating Telephone Companies and the Independent Telephone Companies*, Report and Order, 2 FCC Rcd. 143, 147 (1987).

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[6] See also Memorandum Opinion and Order, Motion of Southwestern Bell Mobile Systems, Inc. for a Declaratory Ruling that Section 22.903 and Other Sections of the Commission's Rules Permit the Cellular Affiliate of a Bell Operating Company to Provide Competitive Landline Local Exchange Service Outside the Region in which the Bell Operating Company is the Local Exchange Carrier, 11 FCC Rcd. 3386, 3395 (1995) ("[T]his proposed integration of wireless and landline services offers substantial benefits to consumers by avoiding duplicative costs, increasing efficiency, and enhancing [Southwestern Bell's] ability to provide innovative service."); Memorandum Opinion and Order on Reconsideration, In re Applications of Craig O. McCaw and American Telephone and Telegraph Company, for Consent to the Transfer of Control of McCaw Cellular Communications, Inc. and its Subsidiaries, 10 FCC Rcd. 11786, 11795, 11799 (1995) ("The ability of a customer, especially a customer who has little or infrequent contact with service providers, to have one point of contact with a provider of multiple services is efficient and avoids the customer confusion that would result from having to contact various departments within an integrated, multi-service telecommunications company . . . to obtain information about various services . . . ."), affirmed sub. nom SBC Communications, Inc. v. FCC, 56 F.3d 1484 (D.C. Cir. 1995) (explicitly permitting AT&T to bundle long distance and cellular service).

D. PERMITTING CARRIERS TO OBTAIN OPT-OUT APPROVAL IS FULLY CONSISTENT WITH THE COMMISSION'S "TOTAL SERVICE APPROACH."

If the Commission permits telecommunications carriers to obtain approval through an opt-out mechanism, the Commission need not reevaluate its "total service approach," which is fully consistent with opt-out approval. For the set of services for which there is an existing customer-carrier relationship, the total service approach confers implicit approval, as the Commission made clear in its Second Report and Order. See 13 FCC Rcd. 8061, 8081 (1998). For marketing services outside the set of services to which the customer already subscribes, the carrier would need to obtain opt-out approval.

II. SECTION 272 IMPOSES AN INDEPENDENT OBLIGATION ON BOCS NOT TO DISCRIMINATE BETWEEN THEIR AFFILIATES AND NON-AFFILIATES IN THE PROVISION OF CPNI.

The Commission has concluded that "section 272 imposes no additional CPNI requirements on BOCs' sharing of CPNI with their section 272 affiliates." See Second Report and Order, 13 FCC Rcd. 8061, 8179 (1998). In the Notice, the Commission determined that the Tenth Circuit had not vacated this conclusion on the scope of section 272. See Notice (¶ 7). Nonetheless, recognizing that the choice of approval mechanism "could impact [its] previous findings regarding the interplay of [sections 222 and 272]," the Commission has sought comment on whether it should revisit its prior interpretation of the statute. Notice (¶¶ 24-26).

As an initial matter, and contrary to the Commission's conclusion in the Notice, the Tenth Circuit's vacatur affected those portions of the Commission's prior CPNI order concerning section 272, and thus the Commission should reconsider the interplay between section 222 and section 272. The Tenth Circuit expressly vacated the entire order, including the discussion of

section 272. See US West, 182 F.3d at 1228 ("We vacate the FCC's CPNI Order."); id. at 1240 ("[W]e VACATE the FCC's CPNI Order and the regulations adopted therein.").[7] Moreover, even if the Tenth Circuit had expressly vacated only those portions of the order concerning the opt-in requirement, such disposition would have to be construed as implicitly vacating those portions of the order concerning section 272, because the Commission's decision to implement an opt-in policy was inextricably intertwined with the interpretation of section 272. See Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, FCC 99-223, 64 FR 53242, 53257 (1999) (explaining that, if section 272 applies to CPNI, BOCs would face an insurmountable burden in soliciting opt-in approval); Second Report and Order, 13 FCC Rcd. at 8177 (explaining that an opt-in requirement "address[es] the competitive concerns implicated by a BOC's use of CPNI" and "render[s] the application of section 272's nondiscrimination requirement not essential").

At any rate, AT&T believes that the Commission misconstrued section 272 in its previous CPNI orders. Under the plain language of the statute, section 272 extends to CPNI. In addition, there is no policy justification for permitting BOCs to discriminate in the provision of CPNI, and application of section 272 to CPNI would not undermine the "total service approach."

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[7] Insofar as the Commission believed the Tenth Circuit had vacated more of the order than it should have, the appropriate response was to seek rehearing or clarification from the Court. That is the course the Commission followed in ASCENT v. FCC, 235 F.3d 662 (D.C. Cir. 2001). In ASCENT, the D.C. Circuit had held that one of the conditions placed on the SBC-Ameritech merger was unlawful; but rather than merely vacate that condition, the Court vacated the entire order approving the merger. In response to the Commission's Motion for Clarification or, in the Alternative, Petition for Panel Rehearing, the Court amended its opinion. See id., 2001 U.S. App. LEXIS 1499. Here, by contrast, the Commission failed to file such a motion in the face of unambiguous language vacating the entire CPNI order.

A. THE PLAIN LANGUAGE OF SECTION 272 PROHIBITS BOCS FROM DISCRIMINATING IN THE PROVISION OF CPNI.

Recognizing that Congress passes statutes rather than isolated clauses, the Supreme Court has often insisted upon "read[ing] [a] statute as a whole, and, unless, there is good reason, . . . adopt[ing] a consistent interpretation of a term used in more than one place within a statute." United States v. Thompson/Center Arms Co., 504 U.S. 505, 512 n.5 (1992); see also Gustafson v. Alloyd Co., 513 U.S. 561, 568 (1995) ("[W]e adopt the premise that [a] term should be construed, if possible, to give it a consistent meaning throughout the Act."). Under this fundamental canon of construction, section 272 unmistakably applies to CPNI. In no uncertain terms, section 272(c)(1) prohibits BOCs from discriminating in the provision of any "information." See § 272(c)(1) ("In its dealings with its affiliate . . . a Bell operating company . . . may not discriminate between that company or affiliate and any other entity in the provision or procurement of . . . *information.")* (emphasis added).[8] And by definition, CPNI - which stands for customer proprietary network *information* - is a type of "information." See § 222(h)(1) (defining CPNI as "(A) *information* that relates to the quantity, technical configuration, type, destination, location, and amount of use of a telecommunications service subscribed to by any customer of a telecommunications carrier, and that is made available to the carrier by the customer solely by virtue of the carrier-customer relationship; and (b) *information* contained in the bills pertaining to telephone exchange services or telephone toll service received by a customer of a carrier") (emphasis added).

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[8] Similarly, Section 272(e)(2) provides that a "Bell operating company and an affiliate that is subject to the requirements of Section 251(c) of this title . . . shall not provide any *information* concerning its provision of exchange access to the affiliate . . . unless such . . . *information* [is] made available to other providers of interLATA services in that market on the same terms and conditions." § 272(e)(2) (emphasis added).

The only way to conclude that section 272 (which covers all "information") does not apply to CPNI (which is defined as "information") is to assign different meanings to the same word in the same statute. But doing so would run afoul of the Supreme Court's directive on statutory construction and would undermine congressional intent. There is no reason apparent in the text or structure of the statute for attributing conflicting definitions to "information." Sections 222 and 272 are not in tension; section 272 simply imposes additional obligations on BOCs, and those obligations are not inconsistent with the requirements of section 222. Nowhere in section 222 is there any suggestion that it is the exclusive provision on CPNI or that it somehow renders inapplicable the requirements in section 272.[9]

Moreover, section 272 explicitly mandates that a section 272 affiliate "operate independently" from the BOC. § 272(b)(1). The affiliate may not obtain special assistance from the BOC or derive a competitive advantage from any relationship with the BOC. Instead, the BOC must treat the affiliate as it would an independent third party. For this reason, section 272 must apply to CPNI. If a section 272 affiliate had privileged access to a BOC's CPNI, the affiliate would possess a significant advantage relative to its competitors. Far from "operating independently," the section 272 affiliate would owe much of its success to its relationship with the BOC.

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[9] The Commission has previously noted that it is not bound by dictionary meanings of terms and that it should "consider other possible interpretations, assess statutory objectives, weigh congressional policy, and apply [its] expertise in telecommunications in determining the meaning of provisions." Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, FCC 99-223, 64 FR 53242, 53257 (1999). AT&T does not disagree. AT&T's contention is not that "information" should be assigned its dictionary meaning, but rather that - whatever the definition of "information" might be - it should be the same in sections 222 and 272.

B. THERE IS NO POLICY JUSTIFICATION FOR PERMITTING BOCS TO DISCRIMINATE IN THE PROVISION OF CPNI.

In reconsidering its CPNI order, the Commission justified its reading of section 272 with a policy argument. According to the Commission, if section 272 applied to CPNI, the BOCs could not function properly: "[T]he nondiscrimination requirements would, in this context, pose a potentially insurmountable burden because a BOC soliciting approval to share CPNI with its affiliate would have to solicit approval for countless other carriers as well, known or unknown." Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, FCC 99-223, 64 FR 53242, 53257 (1999). In effect, the Commission reasoned, application of section 272 "would bar BOCs from sharing CPNI with their affiliates." Id.

The Commission's reasoning was flawed. Far from "insurmountable," the burden on BOCs would be insubstantial. Whether the approval mechanism is opt-in or opt-out, all the BOCs would have to do in order to comply with section 272 is obtain from the customer a blanket approval covering third parties as well as section 272 affiliates. Moreover, the Commission's prior reasoning is even less persuasive if carriers can obtain consent through opt-out approval. An opt-out mechanism would further ease the burden on BOCs, which would no longer need to engage in extensive solicitation. A BOC could satisfy the requirements of section 222 and section 272 simply by sending a single notice to the customers informing them of their opt-out rights.[10] This practice would be consistent with the one followed by financial

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[10] Under section 272, BOCs would not be allowed to solicit opt-out approval in a manner that would discriminate between section 272 affiliates and unaffiliated third parties. In soliciting approval, the BOC would have to present the customer with an all-or-nothing choice: Either the customer opts-out of CPNI transfers to other carriers and section 272 affiliates, or he does not opt-out at all. Otherwise, the BOC could game the system and

(footnote continued on following page)

institutions. Under regulations promulgated by the Federal Trade Commission, notice to financial customers need not list individually each third party that will receive the financial information absent a withholding of customer consent. See 16 C.F.R. § 313.6. It is sufficient to state generally that financial service providers will receive the information, and to provide "illustrative examples such as mortgage bankers, securities broker-dealers, and insurance agents." § 313.6(c)(3)(i). AT&T sees no reason not to adopt this practice of financial institutions.[11]

C. APPLICATION OF SECTION 272 TO CPNI DOES NOT UNDERMINE THE "TOTAL SERVICE APPROACH."

Applying the requirements of section 272 to the sharing of CPNI would not undermine the "total service approach." This approach would still apply in full force with respect to all carriers except BOCs. And the approach would apply with respect to BOCs as well, with one exception. Under the total service approach, if a customer obtains local service from a BOC and long-distance service from the BOC's affiliate, the BOC can share CPNI with the affiliate,

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(footnote continued from previous page)

discriminate in its attempt to obtain approval. Finally, if the customer provides blanket opt-out approval, then the CPNI must be made available to any unaffiliated entity desiring to receive it at the same rates, pursuant to the same terms and conditions, and at the same time as the disclosure is made to the section 272 affiliates.

[11] If the Commission nonetheless decides to prohibit carriers from sharing CPNI with third parties absent opt-in approval, then the same rule should apply to BOCs who wish to share CPNI with section 272 affiliates. Otherwise, a BOC would be free to share its local customer's CPNI with the BOC's section 272 affiliate, irrespective of whether the local customer has chosen the affiliate as his long-distance provider (so long as the customer does not opt-out). The section 272 affiliate would be able to use that CPNI to market its products and services, leaving competitors of the affiliate at a severe disadvantage in marketing.

without any opt-in or opt-out approval. See Second Report and Order, 13 FCC Rcd. at 8100, 8177. To accommodate section 272, the total service approach should be amended to preclude BOCs from sharing CPNI with their long-distance affiliates absent approval obtained on the same terms and conditions as applicable to third parties.

CONCLUSION

The Commission should adopt the interpretations of sections 222 and 272 suggested herein, so as to remain faithful to the statutory text, the intent of Congress, and the policy goals underlying the Telecommunications Act. Moreover, construing section 222 to permit opt-out approval would avoid substantial constitutional concerns.

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